Supreme Court, U. S.
FILED
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MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

October Term, 1977

No. 77-723

DONN E. CASSITY,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

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DONN E. CASSITY,

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Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

Donn E. Cassity petitions that a Writ of Certiorari issue to review the judgment of the United States Court of Appeals for the Tenth Circuit, entered on October 5, 1977, in the above-entitled cases.

OPINIONS BELOW

The Order of the Court of Appeals granting Respondent's Motion for Remand is set forth in Appendix "A" attached to this Petition.

The Orders of the United States District Court for the District of Utah, Central Division, granting Petitioner's Motions to Dismiss Indictments are set forth in Appendix "B" attached to this Petition.

JURISDICTION

The order of the Court of Appeals was entered on October 5, 1977. This Court's jurisdiction is invoked under 28 U.S.C. Section 1254(1).

QUESTION PRESENTED

Did the Court of Appeals have authority to grant Respondent's Motions for Remand?

RULE INVOLVED

Rule 27(a) of the Federal Rules of Appellate Procedure.

> (a) Content of Motions; Response; Reply. Unless another form is elsewhere prescribed by these rules, an application for an order or other relief shall be made by filing a motion for such order or relief with proof of service on all other parties. The motion shall contain or be accompanied by any matter required by a specific provision of these rules governing such a motion, shall state with particularity the grounds on which it is based, and shall set forth the order or relief sought. If a motion is supported by briefs, affidavits or other papers, they shall be served and filed with the motion. Any party may file a response in opposition to a motion other than one for a procedural order [for which see subdivision (b)] within 7 days after service of the motion, but motions authorized by Rules 8, 9, 18 and 41 may be acted upon after reasonable notice, and the court may shorten or extend the time for responding to any motion.

STATEMENT OF THE CASE

In December, 1976 and February, 1977, Petitioner, along with others, was charged in four separate indictments

with violating 18 U.S.C. Sections 2, 371 and 1006. The indictments were filed in the United States District Court for the District of Utah, Central Division and the cases were assigned to Chief Judge Willis W. Ritter.

In March, 1971, Petitioner moved to dismiss the indictments on the ground that the indictments improperly multiplied the charges against him.

A hearing on Petitioner's Motions to Dismiss was held on June 3, 1977, before Judge Ritter, who, after hearing arguments of counsel for both parties, granted the Motions. Later the same day judgments dismissing the indictments as to Petitioner were signed by Judge Ritter and filed with the Court. Thereafter, on June 30, 1977, the Government filed notices of appeal to the Tenth Circuit Court of Appeals from the judgments of dismissal entered in the District Court.

In August, 1977, counsel for Petitioner, Mr. Harold G. Christensen, received Notice from the District Court that on August 8, 1976, the Court would hear "re-argument" of Petitioner's motions along with argument on motions to dismiss brought by some of the other persons originally indicted with Petitioner.

At the August 8 hearing, [a partial transcript of which is attached to this Petition as Appendix "C"] Mr. Christensen appeared on Petitioner's behalf and explained to Judge Ritter that the judgments of dismissal as to Petitioner were on appeal. Judge Ritter responded that he was aware of the appeals and that the District Court had no jurisdiction as to Petitioner. He stated, "all I wanted to do is have you here to keep me clear on what I had done before. I wanted to be uniform." [Transcript, p. 5] Later during the hearing, however, Judge Ritter expressed an opinion that the

Petitioner's Motions to Dismiss had been erroneously granted.

On August 16, 1977, Respondent filed motions 'for remand" with the Tenth Circuit Court of Appeals requesting the Court to remand each of the cases against Petitioner to the District Court "to allow for the entry of an order vacating the order of dismissal which is the subject of . . . appeal and reinstating the case for trial."

Respondent's motions were supported only by a statement that at the August 8 hearing the District Court "concluded that the motions to dismiss had been erroneously granted." No other statements, briefs, memoranda, affidavits or other documents were offered in support of the motions despite Rule 27(a) of the Federal Rules of Appellate Procedure which requires such supporting documents, if any, to be filed with the motions.

Petitioner responded to the motions to remand by filing a memorandum in opposition on September 6, 1977. In the memorandum, Petitioner urged the Court to deny the motions because there existed no grounds upon which the court could grant the motions. Among other points, Petitioner stressed that (1) Respondent's motions, in addition to being unsupported and unmeritorious, were completely unprecedented and (2) to grant the motions would be beyond the authority of the Court in disregard of fundamental procedures of judicial review and Petitioner's rights.

Thereafter, on September 14, 1977, Respondent submitted to the Court an unauthorized memorandum in response to Petitioner's memorandum and in support of its motions. Upon reeciving Respondent's memorandum, Petitioner immediately moved the Court to strike the memo-

randum because (1) the memorandum was unauthorized under the rules and leave of court to file it was not sought or granted, (2) only after the Petitioner filed his memorandum did Respondent file its memorandum which set forth six points for consideration by the court, none of which were raised in the original motions, and (3) the memorandum contained a recitation of alleged facts which were not a part of the record and which involved proceedings to which Petitioner was not a party. In the alternative, Petitioner moved for leave to file a response to Respondent's memorandum.

On October 5, 1977, the Circuit Court considered Respondent' Motions for Remand, including the memoranda submitted in support thereof and opposition thereto, and ordered the appeals to be "remanded . . . to allow for the entry of an order vacating the order of dismissal and reinstating the captioned cases for trial." It is the Circuit Court's order which Petitioner seeks this Court to review.

REASONS FOR GRANTING THE WRIT

In granting Respondent's Motions for Remand, the Circuit Court departed substantially "from the accepted and usual course of judicial proceedings" to the extent that this Court's supervisory authority should be invoked. Rule 19(b), Rules of the Supreme Court of the United States. In addition, the conduct of the Circuit Court violated the Petitioner's constitutional right of due process of law.

I. THE CIRCUIT COURT DEPARTED FROM FUNDAMENTAL PRINCIPLES OF JUDICIAL PROCEDURE AND ENTERED AN ORDER IN CONFLICT WITH AN APPLICABLE DECISION OF THIS COURT.

It is fundamental in the federal court system that

upon the filing of a sufficient notice of appeal, jurisdiction over the case passes from the District Court to the Circuit Court of Appeals. *Petuskey v. Rampton,* 431 F.2d 378 (10th Cir. 1970); *United States v. Raley,* 316 F.2d 36, 37 (10th Cir. 1963); *Willoughby v. Sinclair Oil and Gas Company,* 188 F.2d 902, 904 (10th Cir. 1951); *Walltek v. Hudspeth,* 128 F.2d 343 (10th Cir. 1942). The jurisdiction of Circuit Courts is statutory and appellate [*Hullom v. Ziel,* 266 F. 2d 546 (6th Cir. 1960)] and is generally limited to affirming, reversing or modifying the judgment appealed from.

Under appropriate circumstances, the appellate courts may also upon motion of the parties or their own motion remand a case to the District Court prior to a determination of an appeal on its merits, particularly when the District Court can be of assistance to the Circuit Court in expeditiously resolving the appeal. An example is a remand to allow the lower court to enter formal findings of fact and conclusions of law where such had not been entered prior to an appeal because the appeal had been filed on the day judgment was entered. *Philadelphia Marine Trade Ass'n. v. International Longshoremen's Ass'n.,* 365 F.2d 295 (3rd Cir. 1966), rev'd on other grounds, 389 U.S. 64 (1967). See also, e.g. *Elgen Mfg. Corp. v. Vent Fabrics, Inc.,* 314 F. 2d 440 (7th Cir. 1963); *Edmond v. Moore-McCormick Lines,* 253 F.2l 143 (2nd Cir. 1958).

However, the Motions for Remand presented by Respondent in these cases were not for the purpose of assisting the Circuit Court in the resolution of the appeal but rather for the purpose of terminating the appeals based on alleged new developments in the District Court. Such motions, even if proper, cannot be granted on application of one of the parties. In *Roemer v. Simon,* 91 U.S. 149 (1875), this Court held:

> It is clear that, after an appeal in equity to this court, we cannot, upon motion, set aside a decree of the court below, and grant a rehearing. We can only affirm, reverse or modify the decree appealed from, and that upon the hearing of the cause. . . . The court below cannot grant a rehearing after the term at which the final decree was rendered. . . . It would be useless to remand this cause, therefore, as the term at which the decree was rendered has passed. If the term still continued, the proper practice would be to make application to the court below for a rehearing, and have that court send to us a request for a return of the record, in order that it might proceed further with the cause. Should such a request be made, we might, in a proper case and under proper restrictions, make the necessary order; but we cannot make such an order on the application of the parties. The court below alone can make the request of us. The application of the parties must be addressed to that court, and not to us. 91 U.S. at 150.

See also, *In re Robertshaw,* 75 F.2d 203 (1935) and *Jensen v. New York Life Ins. Co.* 50 F.2d 512 (8th Cir. 1931).

The Circuit Court's Order in these cases ignores and departs from the procedure stated by this Court in *Roemer.* Thus, being in direct conflict with an applicable decision of this Court, the Order should be reviewed.

II. THE CIRCUIT COURT'S ORDER, IF ALLOWED TO STAND, WILL ESTABLISH A PRECEDENT INCONSISTENT WITH THE ORDERLY ADMINISTRATION OF JUSTICE.

In addition to not following the procedure outlined in *Roemer,* the Circuit Court's order granting Respondent's Motions for Remand represented such a departure from established principles of judicial practice that this Court

should invoke its supervisory power to grant the writ sought by this Petition.

In contrast to *Roemer*, where the Motion for Remand was based on alleged new evidence before the lower court, the only ground urged in support of Respondent's Motions for Remand and, therefore, the only ground upon which the Circuit Court's Order could be based is Respondent's allegation that the District Court Judge had indicated a change of mind of the correctness of the Court's decision on Petitioner's Motions to Dismiss. Petitioner's research has uncovered no preceednt or authority supporting a Motion for Remand on such a basis.

To allow the Circuit Court's order to stand would encourage appellants to attempt to persuade District Court judges to reconsider and rehear arguments previously presented while, at the same time, presenting appeals to the Circuit Courts. Judgments would lose finality and appellate review would be in disarray. Such a departure from the basic objectives of the orderly administration of justice should not be permitted.

III. THE CIRCUIT COURT DEPARTED SUBSTANTIALLY FROM THE FEDERAL RULES OF APPELLATE PROCEDURE AND VIOLATED PETITIONER'S CONSTITUTIONAL RIGHT OF DUE PROCESS.

Rule 27(a) of Federal Rules of Appellate Procedure requires those presenting motions to the Circuit Courts to "state with particularity the grounds upon which it [the motion] is based" and further requires all "briefs, affidavits or other papers," if any, in support of the motion to be "served and filed with the motion." Respondent's Motions for Remand were accompanied by no supporting documents. The language contained in the motions which purportedly set forth the grounds therefor is as follows:

> On August 8, 9177, Judge Willis W. Ritter of the United States District Court for Utah held a rehearing on the Motions to Dismiss which he had theretofore granted. After full argument by counsel for both parties, the Court concluded that the Motions to Dismiss had been erroneously granted.

In response to this statement of the alleged grounds for Respondents motion and in accordance with Rule 27(a), Petitioner filed a memorandum in opposition to Respondent's motions for Remand. Thereafter, Respondent, without requesting leave of Court, filed a memorandum unauthorized by Rule 27(a) or any other rule in response to Petitioner's memorandum and which also raised several points purportedly in support of Respondent's Motions which had not previously been asserted.

Immediately upon receiving Respondent's memorandum, Petitioner moved the Court to strike it as being unauthorized and also moved for leave to respond to the Respondent's memorandum in the event the Court denied the motion to strike. The Court, however, did not rule on these motions brought by Petitioner but rather granted the Motions for Remand by an Order as follows:

> This matter comes on for consideration of appellant's motion for remand of the captioned appeals; appellee's memorandum in opposition; appellant's reply; appellee's motion to strike or for leave to respond, and appellant's motion to file supplemental affidavit.
>
> Upon consideration whereof, it is ordered:
>
> The captioned appeals are hereby remanded to the United States District Court for the District of Utah to allow for the entry of an order vacating the order of dismissal and reinstating the captioned cases for trial.

> This order shall be certified to the United States District Court of the District of Utah as and for the mandate. [Appendix "A".]

It is clear from the Order that the Circuit Court considered Respondent's memorandum in reaching its decision. While it is impossible from the language of the Order to ascertain the degree to which the Order was based on the points raised in Respondent's unauthorized memorandum to which Petitioner was not permitted to respond, the Circuit Court's failure to allow Petitioner to respond was inconsistent with the clear intent and purpose of Rule 27(a) and in volation of Petitioner's due process rights.

The obvious procedure contemplated and recognized by Rule 27(a) is to have the movant at the outset provide the other parties with the grounds for his motion to which they may respond. The ultimate objective is to provide the Court with both sides of an issue presented in an orderly manner. To allow the movant to wait to submit authorities and grounds in support of his motion until after the opposition has responded to a vague expression of grounds contained in the original motion is not consistent with the orderly process contemplated by Rule 27(a).

Further, by not granting Petitioner's motion to strike or in the alternative to respond, the Circuit Court deprived Petitioner of his constitutional right of due process by not permitting him to present his side of an issue before decision. Due process requires at a minimum that a party to a lawsuit be given an opportunity to be heard and defend himself in an orderly proceeding adapted to the nature of the case. *Boddie v. Connecticut,* 401 U.S. 371 (1971); *Kinsella v. United States,* 361 U.S. 234 (1960); *Mullane v. Central Hanover Bank & Trust Co.,* 339 U.S. 306 (1950). Rule 27(a) provided for an orderly proceeding but the Circuit Court failed to follow it even after being informed by Petitioner that Respondent's memorandum was unauthorized and presented points to which Petitioner desired but was not permitted to respond.

SUMMARY AND CONCLUSION

In granting Respondent's Motions for Remand, the Circuit Court went beyond its statutory authority. Fundamental principles of appellate procedure and decisions of this Court were ignored and disregarded. The Circuit Court's actions violated Petitioner's Fifth Amendment right of due process. A Writ of Certiori should issue.

Respectfully submitted,

SNOW, CHRISTENSEN & MARTINEAU
Harold G. Christensen
Attorneys for Petitioner

Appendices

APPENDIX A

Order of the Circlit Court

SEPTEMBER TERM — October 5, 1977
Before The Honorable David T. Lewis, Chief Judge,
The Honorable Robert H. McWilliams, Circuit Judge

UNITED STATES OF AMERICA, *Plaintiff-Appellant,*	No. 77-1622 No. 77-1624
vs.	
DONN E. CASSITY, *Defendant-Appellee.*	No. 77-1626 No. 77-1628

This matter comes on for consideration of appellant's motion for remand of the captioned appeals; appellee's memorandum in opposition; appellant's reply; appellee's motion to strike or for leave to respond, and appellant's motion to file supplemental affidavit.

Upon consideration whereof, it is ordered:

The captioned appeals are hereby remanded to the United States District Court for the District of Utah to allow for the entry of an order vacating the order of dismissal and reinstating the captioned cases for trial.

This orde rshall be certified to the United States District Court for the District of Utah as and for the mandate.

HOWARD K. PHILLIPS
Clerk

A true copy
Teste
Howard K. Phillips
Clerk, U. S. Court of
Appeals, Tenth Circuit
By:
Linda A. Carlson
Deputy Clerk

APPENDIX B

Orders of the District Court

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF UTAH
CENTRAL DIVISION

Order CR-76-126

UNITED STATES OF AMERICA,

Plaintiff,

vs.

GLENN W. McMURRAY, R. GLADE WHITING,
E. CASSITY, KENNETH R. LINDQUIST,
DAVID R. NEMELKA, and ROBERT SOLOMON,

Defendants.

Defendant Donn E. Cassity's Motion to Dismiss Indictment having come on regularly for hearing before the Honorable Willis W. Ritter, Chief Judge, on Friday, June 3, 1977, at 10:00 a.m. said defendant appearing in person and by and through his attorney Harold G. Christensen, and the Government having appeared by and through William C. Hendricks, III, Attorney, United States Department of Justice, and Max D. Wheeler, Assistant United States Attorney and the court having heard argument of counsel and being fully advised and it appearing that said Motion should be granted, now, therefore, it is

ORDRED that the Indictment be and the same hereby is dismissed as to defendant Donn E. Cassity.

Dated this 6th day of June, 1977.

Willis W. Ritter
Chief Judge

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF UTAH
CENTRAL DIVISION

Order CR-77-00011

UNITED STATES OF AMERICA,

Plaintiff,

vs.

GLENN W. McMURRAY, R. GLADE WHITING,
DONN E. CASSITY and ROBERT H. WILSTEAD,

Defendants.

Defendant Donn E. Cassity's Motion to Dismiss Indictment having come on regularly for hearing before the Honorable Willis W. Ritter, Chief Judge, on Friday, June 3, 1977, at 10:00 a.m. said defendant appearing in person and by and through his attorney Harold G. Christensen, and the Government having appeared by and through William C. Hendricks, III, Attorney, United States Department of Justice, and Max D. Wheeler, Assistant United States Attorney and the court having heard argument of counsel and being fully advised and it appearing that said Motion should be granted, now, therefore, it is

ORDRED that the Indictment be and the same hereby is dismissed as to defendant Donn E. Cassity.

Dated this 6th day of June, 1977.

Willis W. Ritter
Chief Judge

B-2

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF UTAH
CENTRAL DIVISION

Order CR-77-00013

UNITED STATES OF AMERICA,

Plaintiff,

vs.

GLENN W. McMURRAY, R. GLADE WHITING, DONN E. CASSITY, J. ROBERT WEST, and WELDON B. JOLLEY,

Defendants.

Defendant Donn E. Cassity's Motion to Dismiss Indictment having come on regularly for hearing before the Honorable Willis W. Ritter, Chief Judge, on Friday, June 3, 1977, at 10:00 a.m. said defendant appearing in person and by and through his attorney Harold G. Christensen, and the Government having appeared by and through William C. Hendricks, III, Attorney, United States Department of Justice, and Max D. Wheeler, Assistant United States Attorney and the court having heard argument of counsel and being fully advised and it appearing that said Motion should be granted, now, therefore, it is

ORDRED that the Indictment be and the same hereby is dismissed as to defendant Donn E. Cassity.

Dated this 6th day of June, 1977.

Willis W. Ritter
Chief Judge

B-3

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF UTAH
CENTRAL DIVISION

Order CR-77-00016

UNITED STATES OF AMERICA,

Plaintiff,

vs.

GLENN W. McMURRAY, R. GLADE WHITING, DONN E. CASSITY, MYRON K. RIGBY, and JACK E. LORDS,

Defendants.

Defendant Donn E. Cassity's Motion to Dismiss Indictment having come on regularly for hearing before the Honorable Willis W. Ritter, Chief Judge, on Friday, June 3, 1977, at 10:00 a.m. said defendant appearing in person and by and through his attorney Harold G. Christensen, and the Government having appeared by and through William C. Hendricks, III, Attorney, United States Department of Justice, and Max D. Wheeler, Assistant United States Attorney and the court having heard argument of counsel and being fully advised and it appearing that said Motion should be granted, now, therefore, it is

ORDRED that the Indictment be and the same hereby is dismissed as to defendant Donn E. Cassity.

Dated this 6th day of June, 1977.

Willis W. Ritter
Chief Judge

APPENDIX C

Transcript of Hearing

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF UTAH
CENTRAL DIVISION

Cr 76-126

UNITED STATES OF AMERICA,
Plaintiff,

vs.

GLENN W. McMURRAY; DON E. CASSITY;
R. GLADE WHITING; KENNETH R. LINDQUIST;
DAVID R. NEMELKA,
Defendants.

Cr 77-11

UNITED STATES OF AMERICA,
Plaintiff,

vs.

GLENN W. McMURRAY; R. GLADE WHITING;
DONN E. CASSITY; ROBERT H. WILSTEAD,
Defendants.

Cr 77-13

UNITED STATES OF AMERICA,
Plaintiff,

vs.

GLENN W. McMURRAY; R. GLADE WHITING;
DONN E. CASSITY; J. ROBERT WEST;
WELDON B. JOLLEY,
Defendants.

Cr 77-16

UNITED STATES OF AMERICA,
Plaintiff,

vs.

GLENN W. McMURRAY; R. GLADE WHITING;
DONN E. CASSITY; MYRON K. RIGBY;
JACK E. LORDS,
Defendants.

TRANSCRIPT OF EXCERPT FROM HEARING

Salt Lake City, Utah
August 8, 1977

BEFORE: The Honorable WILLIS W. RITTER,
Chief Judge

APPEARANCES:

For the Government:	MAX D. WHEELER, ESQ. Asst. U. S. Attorney, 200 U. S. Courthouse Salt Lake City, Utah
For Defendant McMurray:	FRED G. BEISINGER, ESQ. Attorney at Law, Felt Building, Salt Lake City, Utah
For Defendant Cassity:	HAROLD G. CHRISTENSEN ESQ. Attorney at Law, 700 Continental Bank Bldg., Salt Lake City, Utah
For Defendant Whiting:	PHIL I. HANSEN, ESQ. Attorney at Law, 250 East 300 South, Salt Lake City, Utah

For Defendant Lindquist: PARKER M. NIELSON, ESQ.
Attorney at Law,
Kearns Building,
Salt Lake City, Utah

For Defendant Nemelka: LaMAR DUNCAN, ESQ.
Attorney at Law,
Phillips Petroleum Building,
Salt Lake City, Utah

For Defendant Wilstead: D. GILBERT ATHAY, ESQ.
Attorney at Law,
321 South 600 East,
Salt Lake City, Utah

For Defendants West and Jolley: JACKSON HOWARD, ESQ.
Attorney at Law,
120 East 300 North Street,
Provo, Utah

For Defendant Rigby: RICHARD A. RAPPAPORT, ESQ.
Attorney at Law,
Boston Building,
Salt Lake City, Utah

For Defendant Lords: ADAM M. DUNCAN, ESQ.
Attorney at Law,
Kennecott Building,
Salt Lake City, Utah

WHEREUPON, the following proceedings were had:

THE CLERK: 76-126.

THE COURT: There is one matter here that needs to be expedited I heard. What is that?

MR. NIELSON: I believe that is the one that was just read, Your Honor, 76-126.

THE COURT: You have to get back to California.

MR. NIELSON: Yes, Your Honor, we do.

THE COURT: This is a reargument.

MR. NIELSON: Yes, it is, Your Honor.

THE COURT: Well, if it is, it's all over before you start. I see no point in having those things reargued.

MR. NIELSON: Well, we were heard last Monday, Your Honor, and I think Your Honor indicated that you wanted to rehear it along with the companion matters which Mr. Christensen and some of the other counsel here are involved in.

THE COURT: Oh, yes. I did something for you and got myself into all the rest of them.

MR. CHRISTENSEN: Well, Your Honor —

THE COURT: Now I wanted to be sure that I was thinking of the right case. Now what was your matter as to that?

MR. CHRISTENSEN: My matter, Your Honor, involved a motion to dismiss four indictments that were filed against Donn Cassity. He was one of the defendants in each of those four indictments. I argued that matter to Your Honor and Your Honor granted —

THE COURT: Well, that was a neat point you had there as I recall.

MR. CHRISTENSEN: Yes, I think it was.

THE COURT: There was a statute and in order to fall

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In the Supreme Court of the United States

OCTOBER TERM, 1977

DONN E. CASSITY, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

WADE H. MCCREE, JR.,
Solicitor General,
Department of Justice,
Washington, D.C. 20530.

In the Supreme Court of the United States

OCTOBER TERM, 1977

No. 77-723

DONN E. CASSITY, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

Petitioner contends that the court of appeals erred in remanding the case to permit the district court to vacate the dismissal of the indictments against petitioner and to reinstate his case for trial.

In December 1976 and February 1977, petitioner was charged in four separate indictments with defrauding an agency of the United States, in violation of 18 U.S.C. 2 and 1006, and with conspiring to commit that offense, in violation of 18 U.S.C. 371 (Pet. 2-3). Petitioner's motion for dismissal of these indictments on the ground of multiplicity was granted on June 3, 1977 (see Pet. App. B), and on June 30, 1977, the government filed a notice of appeal from these orders (Pet. 3).

Petitioner's co-defendants then filed similar motions for dismissal of their indictments. During the course of the hearing on the co-defendants' motions, the district judge indicated his belief that he had erred in granting petitioner's motion to dismiss. Accordingly, the government filed a motion in the court of appeals requesting that the case be remanded to permit the district court to vacate the orders of dismissal and to reinstate the case for trial. The court of appeals granted the government's motion (Pet. App. A).

Petitioner contends (Pet. 5-11) that the court of appeals' procedure in remanding the case to the district court to permit reinstatement of the indictments (which he challenged in the district court as multiplicitous) is unprecedented and denied him due process of law. We believe that this contention is without merit, and that the case presents no issue warranting review in this Court.

The government's motion for remand apprised the court of appeals and petitioner that it was based upon the district court's determination that it had erred in dismissing the indictments against petitioner. After petitioner filed a response opposing the motion, the government filed an affidavit and brief in reply that elaborated upon the circumstances leading to the district court's determination that the dismissals had been erroneous and discussed the reasons a remand would be appropriate.[1] Despite petitioner's arguments that the procedure followed here was improper, we find nothing in Fed. R. App. P. 27 prohibiting the filing of such a reply.[2]

---

[1]Copies of the government's motion, affidavit, and brief are being lodged with the Clerk of this Court.

[2]*Roemer* v. *Simon*, 91 U.S. 149, upon which petitioner relies (Pet. 6-7), is inapposite, since the portion of the quotation petitioner omitted expressly grounds the opinion on the special procedures and

And although the government's brief did not repeat all of the arguments that had been presented to the district court on the multiplicity question, it did focus on the fact that the dismissal of *all* the charges pending against petitioner on the ground of multiplicity was patently improper, since the maximum remedy for multiplicitous charges would be a forced election of counts or a dismissal of the counts that improperly multiplied the offenses charged. See 8 Moore's *Federal Practice* § 8.07[1] (2d ed., 1977); cf. *United States* v. *Universal C.I.T. Credit Corp.*, 344 U.S. 218, 225.

On these facts, the court of appeals' decision to remand the case was a proper exercise of the power conferred upon it by 28 U.S.C. 2106 to "vacate, set aside or reverse any judgment * * * lawfully brought before it for review, and remand the cause * * * or require such further proceedings to be had as may be just under the circumstances." Permitting such reconsideration by the district court is consistent with this Court's practice of remanding decisions to the lower courts for reconsideration in connection with new rulings by this Court, changes in the applicable statutes, confessions of error and the like.[3]

---

requirements of the Equity Rules, which are, of course, no longer in force. For example, Equity Rule 88 terminated the jurisdiction of the court below at the end of its term, a provision relevant to the possibility for a remand to that court.

[3]The court of appeals' ruling will not, of course, prevent eventual appellate review of petitioner's claim of multiplicity; it merely puts him in the same position as he would have been had the district court ruled against him in the first instance. Such a ruling would not have been subject to an interlocutory appeal. See *Abney* v. *United States*, 431 U.S. 651, 663; *Cobbledick* v. *United States*, 309 U.S. 323. If petitioner is convicted, he can appeal, and his claims will be considered on the merits by the court of appeals at that time. If his

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

WADE H. MCCREE, JR.,
Solicitor General.

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conviction is affirmed by the court of appeals, he will then be able to present his multiplicity contention to this Court by way of a petition for a writ of certiorari seeking review of the final judgment.